Filed 2/10/16 In re Lucy L. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re LUCY L., a Person Coming Under the Juvenile Court Law.	
FRESNO COUNTY DEPARTMENT OF SOCIAL SERVICES, Plaintiff and Respondent, v. EDWARD L., Defendant and Appellant.	F071667 (Super. Ct. No. 13CEJ300188-2) **OPINION**

APPEAL from an order of the Superior Court of Fresno County. Kimberly Nystrom-Geist, Judge.

Marissa Coffey, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel C. Cederborg, County Counsel, and David F. Rodriguez, Deputy County Counsel, for Plaintiff and Respondent.

-ooOoo-

Edward L. appeals from an order terminating his parental rights to his daughter, Lucy L., under Welfare and Institutions Code section 366.26.[1] During the course of the proceedings, it was determined that Lucy was eligible for membership in the Eastern Band of Cherokee Indians, and the juvenile court proceeded according to the Indian Child Welfare Act (ICWA; 25 U.S.C. § 1901 et seq.). Edward contends the juvenile court erred in terminating his parental rights because there is insufficient evidence to support the juvenile court's findings that (1) under section 366.26, subdivision (c)(2)(B)(ii), Lucy would be at substantial risk of emotional and physical harm if placed in the custody of her mother, Vanessa S. (mother); and (2) the Indian Child Exception to adoption (§ 366.26, subd. (c)(1)(B)(vi)(I)) does not apply. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

These dependency proceedings began in June 2013, after mother tested positive for methamphetamine at the birth of her sixth child, S.Y. Mother admitted using methamphetamine days before S.'s birth. This was not the first time mother tested positive for methamphetamine at a baby's birth; she had tested positive at the birth of her fourth child, Hector J., in August 2009. Following Hector's birth, mother participated in voluntary family maintenance services, including a six-month inpatient treatment program; her case was closed in September 2010 as the family had stabilized.

The Fresno County Department of Social Services (Department) removed S.Y. and two of his half-siblings, then three-year-old Hector and 20-month-old Lucy, from mother's custody and filed a petition alleging the children came within the provisions of section 300, subdivision (b), as they were at risk of suffering serious physical harm as a

[1] Undesignated statutory references are to the Welfare and Institutions Code.

result of mother's failure to provide care for them due to her substance abuse.[2] The children were placed together in foster care.

The children have different fathers. Mother told the social worker that Lucy's father, Edward, had not been a part of her life and was incarcerated at the Federal Correctional Institute (FCI) in Mendota, although she did not know the reason he was incarcerated. The Department considered Edward to be Lucy's alleged father, noting that he was not listed on her birth certificate. Mother had been married to S.'s father for two years, but they were divorcing.

The juvenile court detained the children and placed them in the Department's care, removing them from mother's custody. Mother did not have American Indian ancestry.

On August 8, 2013, the juvenile court granted Edward's ex parte request for a paternity test, which later confirmed that Edward is Lucy's biological father. At the August 8 hearing, Edward's attorney informed the court and parties that ICWA may be an issue because Edward was enrolled in the "Eastern Cherokee North Carolina" tribe.

In August 2013, the Department sent a Notice of Involuntary Child Custody Proceedings for an Indian Child to the three federally recognized Cherokee tribes and the Bureau of Indian Affairs. Based on the responses received from the tribes, the Department filed a motion to declare ICWA inapplicable to Lucy in October 2013.

On October 22, 2013, the juvenile court found the petition's allegations true and set the disposition hearing, with the ICWA motion to be heard at the same time. The Department filed a report for the disposition hearing in which it recommended that the children be adjudged dependents, mother be ordered to participate in reunification services, and Edward be denied reunification services pursuant to section 361.5, subdivision (a). Mother told the social worker that Edward was incarcerated at the time

[2] The petition did not include mother's other children, Jesus, Juan and Junior R., as they were residing with other family members at the time. The petition was amended later to add an allegation that Hector's father's whereabouts were unknown.

of Lucy's birth and Lucy had never lived with him. An officer at FCI reported that father was incarcerated for felony possession of a firearm and his expected release date was April 12, 2016. Edward confirmed that he was incarcerated at the time of Lucy's birth and he did not have a relationship with her, although he wanted to establish one. Edward claimed mother kept Lucy away from him and his family, and that Lucy had never had contact with his family.

Mother had entered an inpatient drug treatment program in July 2013, but she discharged herself from the program on November 10, 2013, after her counselor expressed concerns about her fraternization with a male resident. Although mother had been visiting the children regularly since July 2013, she stopped visiting them after she left the program.

At the January 14, 2014 disposition hearing, the juvenile court declared the children dependents, committed them to the Department's care and custody, removed them from mother's custody, found mother's progress to be minimal, and ordered reunification services for mother. The court denied reunification services for Edward pursuant to section 361.5, subdivision (a). The juvenile court set a post-disposition mediation for March 4, 2014, and a combined six- and 12-month review hearing for July 1, 2014. The juvenile court found ICWA was inapplicable to the proceedings and granted the Department's ICWA motion.

On January 22, 2014, the Department filed a copy of a letter received from James Sanders, of the Eastern Band of Cherokee Nation, in which he stated that Lucy was eligible for enrollment through her father, Edward, who had an enrollment number. Based on this information, the Department filed a section 388 petition on February 5, 2014, asking the juvenile court to find that ICWA was applicable with respect to Lucy. A hearing on the petition was held on March 4. The juvenile court granted the petition, found ICWA applicable to the proceedings involving Lucy, and directed the Department

to retain an ICWA expert to offer an opinion for an interim review hearing the court set for April 1.

On March 28, 2014, the declaration of ICWA expert Sean H. Osborn was filed. Osborn reviewed the petition, the Department's reports, and the response letter; he also interviewed Sanders and the Department's social worker, Ashleigh LaBoy. Osborn outlined the active efforts made for mother and opined that the services provided her appeared to be designed to prevent the breakup of the Native American family home.

Osborn also reviewed the placement preferences. Osborn acknowledged that the first placement preference for an Indian child is with a member of the child's extended family. He understood that mother had not provided a relative's name for placement, other than her sister, Irene S., who was determined to be an inappropriate placement due to her recent child welfare history. Sanders told Osborn the tribe was preparing a formal letter for the court indicating it did not wish to intervene in the case at that time, but Sanders said he could assist in trying to locate a suitable relative for possible placement of Lucy. Osborn noted the next several placement preferences were specific to various types of Native American homes, but there was no indication in the Department's reports that these homes were available for placement of Lucy. The remaining option was in a general foster care home, such as the home where Lucy was placed with her half-siblings. According to Osborn, this appeared to be an appropriate placement for Lucy at that time.

Finally, Osborn opined that Lucy would be at risk of serious emotional or physical damage if returned to mother's or Edward's care. His opinion was based on the following: (1) mother tested positive for methamphetamine on the birth of Hector and S.; (2) mother's failure to be actively involved in services, as LaBoy told him mother was not participating in drug testing, substance abuse treatment, or parenting classes; (3) the strong likelihood that mother would return to methamphetamine use due to her failure to successfully overcome her substance abuse issues; and (4) Lucy could not be placed with Edward due to his incarceration and, even if he were not incarcerated, Lucy could not be

placed in his care until Edward received services to address the lifestyle which resulted in his incarceration. Osborn stated that Sanders agreed with his opinion that Lucy would be at risk of serious emotional or physical harm if returned to her parents' care at that time.

At the April 1 hearing, Osborn confirmed his opinions made in his declaration regarding returning Lucy to parental care, her current placement, and "active efforts." The juvenile court found that ICWA applied; the ICWA requirements as to removal, placement and return at disposition had been met; and services did not need to be updated.

On May 7, 2014, father filed a section 388 petition in which he asked the juvenile court to order reasonable supervised visits with Lucy. He asserted visitation was in Lucy's best interest because it would allow her to know and begin developing a relationship with her biological father. The Department, mother and Sanders were all opposed to the petition since Edward had never met Lucy, he was not expected to be released until 2016, two-year-old Lucy was developmentally delayed and her speech limited, and it was not in Lucy's best interest to meet Edward for the first time in prison. On May 27, the juvenile court denied Edward's petition without prejudice, finding it facially inadequate on the issue of best interest.

In reports prepared for the combined six- and 12-month review hearing, the Department recommended that mother's reunification services be terminated, the case be transferred to the Assessment and Adoptions Unit to establish an appropriate permanent plan for the children, and a section 366.26 hearing be set. According to the Department, mother had made only moderate progress; she completed a parenting program and had participated in a mental health assessment, which recommended she participate in individual therapy to address her chronic at-risk behavior, but she did not return to a residential treatment program until early April 2014. She was participating in a 90-day program and requested a 90-day extension to ensure her return to sobriety and prevent relapse. Mother was five months pregnant with her seventh child.

Sanders agreed with the Department's recommendation and Lucy's continued placement. Sanders told the social worker that he had exhausted his search for a possible relative placement and had not found anyone who could take Lucy and meet her needs. The tribe did not want to intervene at that point and it was in support of the care provider providing Lucy with a permanent plan. According to the social worker, Tribal Customary Adoption did not appear to be appropriate, as the tribe had chosen not to intervene. In June 2014, the Eastern Band of Cherokee Indians approved Lucy's application for enrollment with the tribe, assigned her a revised roll number, and issued both a Tribal Enrollment Card and a Certificate of Degree of Indian Blood card.

The Department reported that the children appeared to be doing well in their current placement and to have a positive bond with their care provider. They engaged with her, were affectionate with her, and sought her attention. The care provider was meeting the children's needs and identified developmental concerns. Lucy had been found eligible for services at the Central Valley Regional Center (CVRC) based on her developmental delays in the areas of speech and language development, safety awareness and being resistant to adult control, and the care provider was compliant with her services.

A contested six- and 12-month review hearing was held on September 16, 2014, at which mother and social worker LaBoy testified. The juvenile court found mother had not made sufficient progress to allow the children's safe return to her custody; concluded mother's progress was moderate and returning the children would create a substantial risk of detriment to their well-being; and found the Department had provided reasonable reunification services and demonstrated there was no substantial probability the children could be returned to mother and safely maintained in the home. As a result, the court terminated reunification services and set a section 366.26 hearing for January 6, 2015.[3]

[3] Mother filed a Notice of Intent of File Writ Petition on September 16, 2014. This court denied mother's petition for extraordinary writ in an unpublished decision,

In the report prepared for the January 6, 2015[4] hearing, the Department recommended termination of parental rights and identification of adoption as the permanent plan. Lucy and her two half-siblings had been together in the same foster home since June 2013; the foster parents were committed to adopting the children. Lucy was healthy. Her CVRC services ended when she turned three years old the prior September and the foster parents were investigating whether to place her in a Head Start program in August. Lucy was described as sweet and very friendly; she was able to understand Spanish and English, but spoke only in single words.

Mother had visited the children consistently since January 2014, and had progressed from supervised to unsupervised visits at her residential treatment facility. Mother had given birth to her seventh child, a girl, who was not detained from her custody and was present during visits.

At the January 6 hearing, Edward made his first appearance in juvenile court, appearing by telephone. Edward's attorney objected to the Department's report, as it did not address ICWA issues or contain an expert declaration, and asked for a continuance for the Department to prepare an adequate report. Father's attorney also was concerned that while Edward's family members were attempting to be cleared for possible placement of Lucy, the report did not contain any information about how that was progressing, and asked for updated discovery regarding the placement efforts.

The juvenile court reviewed the history of the proceedings regarding ICWA and determined that a nunc pro tunc order was required to show that Edward had been elevated to a biological father as of March 4, 2014. The juvenile court ordered an

---

Vanessa S. v. Superior Court (Dec. 15, 2014, F070095). The Department has filed a motion in the current proceeding asking us to take judicial notice of this decision. We deferred ruling on the motion, which we now grant.

[4] Subsequent references to dates are to dates in 2015 unless otherwise noted.

addendum report to address ICWA issues and the filing of an ICWA expert's declaration, and set a contested hearing for March 5.

On January 28, mother filed a section 388 petition seeking reinstatement of reunification services or, in the alternative, return of the children to her care. Mother asserted that since her services were terminated, she: (1) had completed an outpatient substance abuse program and sober living aftercare; (2) moved into an apartment and regained custody of her nine and ten year old sons; (3) gave birth to, and retained custody of, a new baby; (4) discontinued a romantic relationship with James L.; and (5) continued nine hour weekly visits with the children at the sober living house.

On February 24, the March 5 trial date was vacated and the trial set for March 26, to give the Department time to obtain a declaration from the ICWA expert. The Department filed the declaration of ICWA expert Osborn on March 15, in which he stated that Lucy's current placement with her half-siblings was appropriate to meet her needs because the tribe agreed with the recommendation to terminate parental rights and Sanders had indicated there were no tribal homes available for placement of Lucy. Based on his review of the Department's reports, Osborn opined it was clear that Lucy would be at risk of serious emotional or physical damage if returned to her parents' care because of mother's history of substance abuse problems and unstable relationships, Lucy's need for stability, and the fact that Edward had not had any contact with Lucy. Osborn understood that mother had completed a substance abuse treatment program after services were terminated, but noted that due to mother's years of instability and substance abuse, she would need to demonstrate the ability to be stable, and to refrain from substance abuse and abusive relationships, over a significant period of time before Lucy could be returned to her care.

Edward's attorney received Osborn's declaration the day before the March 26 hearing and believed the declaration to be deficient. Consequently, at the March 26 hearing he asked for a continuance and that the Department be ordered to prepare a report

that fully complied with ICWA. The Department, however, asserted the report was adequate. The juvenile court found good cause to continue the trial due to the late report, declined to order the Department to provide another report as the Department could take the position that the report is adequate, and set a settlement conference for April 21.

On April 20, mother filed a statement of issues. While mother recognized that ICWA applied to Lucy, she asserted that the children should not be separated because they are a strong and bonded sibling group, and therefore she believed the children should either be returned to her care or temporarily placed in a long term plan that would allow her to complete reunification. She listed the legal issues as being whether three exceptions to termination of parental rights applied, namely the beneficial parent-child relationship, sibling relationship, and the Indian Child exceptions.

On April 21, the juvenile court set a combined contested permanency planning hearing and contested hearing on mother's section 388 petition for April 27. The hearing continued over several days, concluding on May 27, when the juvenile court issued its decision. At the outset of the April 27 hearing, the parties stipulated that if called to testify, Edward would testify: (1) he received approximately $3,000 to $4,000 in per capita payments from his tribe every six months; (2) his tribal membership gave him health benefits, such as medical care through Central Valley Indian Health, although he pays the cost of medication; (3) many tribes give preference for jobs on reservations to members of their tribe and members of other tribes; and (4) he believes he has benefited from, and Lucy would benefit from, cultural practices, beliefs and heritage.

As pertinent here, the juvenile court received into evidence the Department's January 6 report and Osborn's March 25 declaration. Later in the proceedings, the juvenile court took judicial notice of the Department's reports prepared for the July 1 and August 19, 2014, hearings, as well as Osborn's March 28, 2014 declaration. County counsel made an opening statement on the Department's behalf and submitted on the reports.

Mother testified on her own behalf. She had been sober for 13 months. Mother had completed a parenting class and both an inpatient and outpatient substance abuse program, was engaging in therapy through her aftercare program, was in school, resided in a two-bedroom apartment, attended church, and testified she had no dirty drug tests for 13 months. Two of mother's older children, who had been living with their maternal grandmother for six years, had been living with her for about six to seven months.[5] Mother visited the children regularly and had not missed a single visit since her services were terminated. Her other children who were not dependents participated in visits, as well as the maternal grandmother and maternal aunt. According to mother, the children would get excited when she visited them and she managed to interact with all three of them during visits. It was not easy for mother or the children when visits ended.

Mother knew Lucy was eligible for membership in a Cherokee tribe and testified that if the court found she needed to keep a tribal connection, she would be able to assist Lucy with that. Mother explained that she wanted Lucy to grow up to know her father's culture and to be involved in it; she did not want to come between Lucy and her father, and the culture, "which is the Indian tribe and getting involved and their beliefs and spiritual beliefs as well."

Mother's older sister, Patricia V., testified that she lived in Fresno near mother and was very familiar with mother's day-to-day activities. Patricia regularly participated in mother's visits with the children while mother was in the treatment program. According to Patricia, mother had been demonstrating a great deal of patience in running her household while going to school. Patricia and her two older daughters were willing to assist mother.

---

[5] Mother's oldest son, 11-year-old Junior C.R., lived with his paternal grandmother.

The juvenile court granted the Department's request to reopen its case-in-chief to call Osborn to testify about the declaration he made in 2014. By stipulation of all counsel, the juvenile court designated Osborn as a qualified expert to render an opinion on the issues of active efforts and detriment under the ICWA. Osborn prepared the March 2014 declaration, in which he opined that the Department had provided active efforts as required by ICWA and Lucy would be at risk of harm if returned to either parent. To update himself before preparing his March 2015 declaration for the section 366.26 hearing, Osborn spoke "very briefly" with the social worker, and obtained copies of the Department's report for the section 366.26 hearing, two addendum reports, and a status review report. He relied on the social worker to provide him with all the accurate information.

Osborn's opinion regarding Lucy being at risk of serious emotional harm if returned to either parent had not changed. Osborn opined that an order terminating parental rights would not interfere with the benefits Lucy could derive as a member of the Eastern Band of Cherokee Indians and she would not lose her membership in the tribe. It had been over a year since Osborn spoke with Sanders; Osborn recalled that Sanders agreed at that time that Lucy would be at risk in her parents' care. Osborn was unable to speak with Edward or mother. ICWA did not require him to do interviews, so he did not always speak with a parent.

Osborn did not interview the prospective adoptive parents and had no idea whether they intended to preserve Lucy's Indian heritage, but that was not typically a role he would be acting in as an ICWA expert. Osborn explained that he did not weigh or consider the prospective adoptive parents' intent in determining whether adoption in a non-Indian family would be appropriate because ICWA does not require that at this point, since they were not yet the adoptive parents and it was always possible someone else would become the adoptive parents.

Osborn was not aware of mother's year-long sobriety, or that she had three children in her care, but this information would not affect his assessment. His opinion was based on the information provided at the time he wrote his report and he did not have enough details to change his opinion. He was not prepared to change his opinion without having an opportunity to read about all of the more recent information concerning mother.

After hearing closing arguments from all of the parties, the juvenile court issued its decision. The juvenile court denied mother's section 388 petition, finding (1) while mother had demonstrated she was making great strides toward achieving change, she had not demonstrated by a preponderance of the evidence that change had actually occurred, but instead demonstrated changing circumstances, and (2) even if mother demonstrated changed circumstances, she had not proven by a preponderance of the evidence that the requested change was in the children's best interest.

The juvenile court found by clear and convincing evidence that the children were generally and specifically adoptable, and were with a care provider who planned to adopt them. The juvenile court explained that it therefore must terminate parental rights and place the children for adoption unless it found a compelling reason for determining that termination would be detrimental. The juvenile court found that mother had not met her burden of showing that the beneficial parent-child relationship or sibling exceptions applied.

With respect to the Indian Child exception, the juvenile court found the evidence established that termination of parental rights would not substantially interfere with Lucy's connection to her tribal community, or with her tribal or membership rights. The juvenile court also found that the Department made active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian

family.[6] Finally, it found, beyond a reasonable doubt, that continued custody by the parent was likely to result in severe emotional or physical damage to Lucy.

The juvenile court found it was likely the children would be adopted and that adoption was the appropriate permanent plan. The juvenile court terminated parental rights and ordered the children placed for adoption.

DISCUSSION

The Section 366.26, subdivision (c)(2)(B)(ii) Finding

Edward contends there is insufficient evidence to support the juvenile court's finding, made pursuant to section 366.26, subdivision (c)(2)(B)(ii),[7] that mother's continued custody of Lucy was likely to result in serious emotional or physical damage to Lucy. According to that subdivision, a juvenile court cannot terminate parental rights over an Indian child without making such a determination, supported by evidence beyond a reasonable doubt. (§ 366.26, subd. (c)(2)(B)(ii).)

Although this finding relates only to mother's custody of Lucy, not Edward's, and mother did not appeal from the order terminating her parental rights, Edward asserts he has standing to raise the issue on appeal because he has an interest in Lucy's placement in an ICWA preferred home, which in this case is with mother. He argues that he is

---

[6] In its analysis of the issue of active efforts, the juvenile court considered the Bureau of Indian Affairs Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Federal Register 10146-10159 (Feb. 25, 2015 (BIA Guidelines). Edward filed a request for us to take judicial notice of the BIA Guidelines pursuant to Evidence Code sections 452, subdivision (d)(1), 453, and 459, subdivision (a). We deferred ruling on the request, which the Department does not oppose. We now grant the request.

[7] Section 366.26, subdivision (c)(2)(B)(ii) provides: "(c) [¶] . . . (2) The court shall not terminate parental rights if: [¶] . . . (B) In the case of an Indian child: [¶] . . . (ii) The court does not make a determination at a hearing terminating parental rights, supported by evidence beyond a reasonable doubt, including testimony of one or more 'qualified expert witnesses' as defined in Section 224.6, that the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child."

aggrieved by the juvenile court's assessment that mother's custody of Lucy would likely result in serious emotional and physical damage to Lucy because this finding allowed the juvenile court to terminate his parental rights.

Edward, however, has no standing to raise this issue. A parent may not raise issues on appeal which do not affect his or her own rights. (*In re Jasmine J.* (1996) 46 Cal.App.4th 1802, 1806.) Edward's interest is limited to continuation or termination of his own parental rights. (*In re Caitlin B.* (2000) 78 Cal.App.4th 1190, 1193.) And one parent, here Edward, cannot benefit from an error in terminating the other parent's rights "so as to make into error an errorless termination of [*his*] parental rights." (*Id.* at p. 1194; see *Los Angeles County Dept. of Children and Family Services v. Superior Court* (2000) 83 Cal.App.4th 947, 949.) Moreover, "'[a]n appellant cannot urge errors which affect only another party who does not appeal.'" (*In re Gary P.* (1995) 40 Cal.App.4th 875, 877.) Here, mother did not appeal and the order terminating her parental rights is now final. To allow Edward to raise the issue of Lucy's safety while in mother's custody as precluding adoption and the termination of parental rights is procedurally improper.

In addition, even if we found the juvenile court erred, in order to effect the relief Edward requests, namely that Lucy be placed in mother's custody, we would have to reinstate mother's parental rights. We have no power to do so, however, as the order terminating mother's rights cannot be set aside absent an appeal by mother. (§ 366.26, subd. (i)(1); *In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1161 ["This statute forbids alteration or revocation of order terminating parental rights except by means of a direct appeal from the order."].)

Edward contends he has standing under the following rule our Supreme Court established in *In re K.C.* (2011) 52 Cal.4th 231, 238: "A parent's appeal from a judgment terminating parental rights confers standing to appeal an order concerning the dependent child's placement only if the placement order's reversal advances the parent's argument against terminating parental rights." Although Edward attempts to frame his argument as

pertaining to Lucy's placement, the finding he is challenging is not a placement order, but rather a finding that must be made before the juvenile court may terminate parental rights.

The Indian Child Exception to Adoption

This leaves the second issue father raises, namely whether the juvenile court erred when it declined to apply the section 366.26, subdivision (c)(1)(B)(vi)(I) Indian Child Exception to adoption. Edward contends the juvenile court erred by finding that termination of parental rights would not substantially interfere with Lucy's connection to the tribal community, as its finding is not supported by substantial evidence.

"Adoption, where possible, is the permanent plan preferred by the Legislature." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573.) If the court finds a child cannot be returned to his or her parent and is likely to be adopted if parental rights are terminated, it must select adoption as the permanent plan unless it finds a compelling reason for determining that the termination of parental rights would be detrimental to the child under one or more of the enumerated statutory exceptions. (§ 366.26, subds. (c)(1)(A) & (B)(i)-(vi); *In re A.A.* (2008) 167 Cal.App.4th 1292, 1320 (*A.A.*).)

"The parent has the burden of establishing the existence of any circumstance that constitutes an exception to termination of parental rights." (*In re T.S.* (2009) 175 Cal.App.4th 1031, 1039.) Because a section 366.26 hearing occurs "after the court has repeatedly found the parent unable to meet the child's needs, it is only in an extraordinary case that preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.)

At issue in the present case is the exception provided by section 366.26, subdivision (c)(1)(B)(vi), which provides, in pertinent part: "The child is an Indian child and there is a compelling reason for determining that termination of parental rights would not be in the best interest of the child, including, but not limited to: [¶] (I) Termination of

parental rights would substantially interfere with the child's connection to his or her tribal community or the child's tribal membership rights. . . ."

A parent claiming the Indian child exception to termination of parental rights has the burden of proof. (*In re C.B.* (2010) 190 Cal.App.4th 102, 133.) On appeal, "the abuse of discretion standard governs review." (*Id.* at p. 123.) More specifically, "'the trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious.'" (*Ibid.;* see *A.A., supra,* 167 Cal.App.4th at p. 1322 ["whether a compelling reason exists under the Indian Child Exception is an issue committed to the trial court as the trier of fact and its discretion to resolve whether, on any statutory grounds, that termination would be detrimental to an otherwise adoptable child"].)

Here, Edward contends there is a compelling reason not to terminate his parental rights because, in doing so, Lucy's connection to her tribe will suffer substantial interference. He asserts this is shown by his testimony that he receives money from the tribe every six months, his tribal membership makes him eligible for health benefits and job preferences, and he believes Lucy would benefit from the tribe's cultural practices, beliefs and heritage. He also contends there is insufficient evidence to show that Lucy would have a connection to the tribe if his parental rights were terminated, since Osborn never spoke with the prospective adoptive parents to find out if they knew about Lucy's Indian heritage and whether they would ensure Lucy would be connected to her tribe. Edward argues it is imperative that Lucy be raised by someone who is aware of the implications of a tribal connection, and is committed to ensuring Lucy benefits from her Indian heritage.

In his argument, however, Edward loses sight that it was his evidentiary burden to establish that terminating his parental rights would interfere substantially with Lucy's connection to the tribal community. (*A.A., supra,* 167 Cal.App.4th at p. 1324.) There was no evidence to establish that terminating Edward's parental rights would interfere

with Lucy's connection to the tribe, as she is a tribal member in her own right. Although Edward testified that he received monetary and other benefits due to his tribal membership, no evidence was presented that Lucy would be deprived of such benefits should his parental rights be terminated. Instead, the evidence showed that termination of Edward's parental rights would not interfere with the benefits Lucy could derive from her tribal membership, which she would not lose. While Edward argues there is no evidence Lucy's prospective adoptive parents would promote her connection to the tribal community, the mere absence of evidence on this point does not prove Edward's argument that terminating his parental rights would interfere substantially with Lucy's connection to the tribe.

In sum, Edward has failed to demonstrate that the juvenile court erred in declining to apply the Indian Child Exception and terminating his parental rights.

DISPOSITION

The order terminating Edward's parental rights is affirmed.

_____
GOMES, J.

WE CONCUR:

_____
HILL, P.J.

_____
FRANSON, J.